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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, *et al.*,
Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

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American Institute of Merchant Shipping, Assurance-foreningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The London Steam-Ship Owners' Mutual Insurance Association, Limited, Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association, Limited, The Standard Steamship Owners' Protection & Indemnity Association, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda), Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting and Indemnity Association, Sveriges Angfartygs Assuransforening, The United Kingdom Mutual Steam Ship Assurance Association (Ber-

muda), Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), and their respective members, appellees in the above entitled action, by their attorneys, Nicholas J. Healy and Gordon W. Paulsen, and Suwannee Steamship Co., a Florida corporation, Commodores Point Terminal Corporation, a Delaware corporation, appellees in the above entitled action, by their attorney, James F. Moseley, respectfully move to affirm the decision of the three judge federal Court below * on the grounds that it is clearly correct and that the questions presented by Appellants are so unsubstantial as not to require further argument.

Subsection 1(c) of Rule 16 of the Revised Rules of this Court provides:

> "The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

The questions raised by Appellants in their Jurisdictional Statement are stated as follows:

> "(1) Whether the District Court erred in declaring unconstitutional a statute designed to protect the state, its citizens, and its environment from economic and ecological damage resulting from massive pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, on ground that in Article III, Section 2, Clause 3, United States Constitution, the states surrendered to the federal government all power to enact substantive legislation affecting maritime commerce.
>
> 2. Whether the District Court erred in construing the Federal Water Quality Improvement Act of

* Reported at 335 F. Supp. 1241 (M.D. Fla. 1971).

1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970); 33 U.S.C. § 1161 et seq. as preempting the states from enacting legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances."

Reasons for Granting the Motion to Affirm

The question of unconstitutionality under Article III, Section 2, Clause 3 of the United States Constitution was thoroughly considered and correctly decided by the Court below. The decision declaring the Florida Act unconstitutional is so clearly in harmony with the decisions of this Court that further argument would simply result in belaboring the obvious. As stated in the opinion below:

> "It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field." 335 F. Supp. 1241, at 1248.

After quoting from this Court's opinion in the landmark *Jensen* case,[1] the Court below continued:

> "The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.'
>
> This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on fed-

[1] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

eral interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fills a 'void' in the maritime law and is justifiable under the 'gap theory.'[2] This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne* v. *States Marine Lines, Inc.*[3] clearly puts such a theory to rest." *Id.*, at 1248-1249.

With respect to Appellants' contention that the Court below erred in construing the Federal Water Quality Improvement Act of 1970 as preempting the states from enacting legislation such as the Florida Act, it is respectfully submitted that the Court below did *not* so hold. The Court below merely commented:

"Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A.:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. 33 U.S.C. § 1161(o)(2).

It has long been recognized that Congress is powerless to confer on the states authority to legis-

[2] See, Currie, *"Federalism and the Admiralty," The Supreme Court Review* 1960, 158 at 166-73.

[3] 398 U.S. 375 (1970).

late within the admiralty jurisdiction [*Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920); *The Lottawanna*, 21 Wall. 558 (1875); *The Steamer St. Lawrence*, 1 Bl. 522 (1862)] and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative." *Id.*, at 1249.

These Appellees submit that the Court's comment is correct, and that the second "question" raised by Appellants is in reality no question at all.

CONCLUSION

The decision below is clearly correct and this appeal presents no substantial question; the judgment of the three judge Court below should therefore be affirmed without further argument.

Dated: March 20, 1972

Respectfully submitted,

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